



**Testimony of Nicole Neily
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Before the House Committee on Judiciary
Subcommittee on the Constitution and Limited Government
March 23, 2023**

“Free Speech: The Biden Administration’s Chilling of Parents’ Fundamental Rights”

Chairman Johnson, Ranking Member Scanlon, and distinguished members of the subcommittee, thank you for inviting me to appear today.

My name is Nicole Neily, and I am the president and founder of Parents Defending Education – a national membership association that gives parents the knowledge and tools they need to be more effective advocates for their children’s education – and the executive director of PDE Action. In addition, I am the founder of Speech First, a national campus free speech organization, so this hearing topic is one that is near and dear to my heart.

On September 29, 2021, Viola Garcia, the president of the National School Boards Association, sent a letter¹ to President Biden requesting federal intervention in school board issues – invoking, among other statutes, the U.S. Patriot Act, as proof that federal intervention in school board issues was warranted. Her letter stated that “the classification of these heinous actions could be the equivalent to a form of domestic terrorism and hate crimes.”

The NSBA sought assistance from “the U.S. Department of Justice, Federal Bureau of Investigation (FBI), U.S. Department of Homeland Security, U.S. Secret Service, and its National Threat Assessment Center” – although it is worth noting that an early draft of the letter revealed² that the NSBA’s initial ask also reportedly included that the National Guard and Military Police be deployed against parents.

Parents across the country were shocked by this letter, and even more taken aback when a mere five days later – lightning speed in Washington DC – a memo, signed by the Attorney General of the United States, was issued³ on October 4, 2021, “directing the Federal Bureau of Investigation, working with each United States Attorney, to convene meetings with federal,

¹ <https://defendinged.org/wp-content/uploads/2021/11/Letter.pdf>

² <https://www.dailywire.com/news/nsbas-first-draft-of-domestic-terrorism-letter-called-for-feds-to-sic-army-national-guard-and-its-military-police-on-parents-independent-review-shows>

³ https://www.justice.gov/d9/pages/attachments/2021/10/04/partnership_among_federal_state_local_tribal_and_territorial_law_enforcement_to_address_threats_against_school_administrators_board_members_teachers_and_staff_0_0.pdf

state, local, Tribal, and territorial leaders in each federal judicial district within 30 days of the issuance of this memorandum.”

Unsurprisingly, parents were frightened by this escalation; in the days following the release of the Attorney General’s memo, my colleagues and I fielded dozens of requests from concerned parents who worried whether they should continue their advocacy work or simply stay home, fearing a knock at the door from federal law enforcement.

While we worked to reassure parents that they have a fundamental right⁴ – guaranteed by the First Amendment of the U.S. Constitution – to petition their government for a redress of grievances, we partnered with 21 other organizations on behalf of more than 427,000 Americans to contact⁵ the NSBA regarding its outlandish memo, alerting them that we vehemently disagreed with the association’s characterization of this grassroots activism. PDE also launched a comment portal to help Americans communicate their displeasure directly to the Department of Justice regarding its memo; over 7,500 people sent letters to DOJ about this overreach.

Families’ fears, however, turned out to be well-founded; on October 14, 2021, Acting U.S. Attorney Leif Johnson sent a memo⁶ to the Montana Attorney General, all county attorneys, all sheriffs, the Montana Office of Public Instruction, and the Montana School Boards Association outlining “a short summary of federal statutes that may serve as a basis for a prosecution of such threats and violent conduct.”

Two days later, on October 16, 2021, Carlton Peeples, Deputy Assistant Director of the FBI’s Criminal Investigative Division, sent a joint message from the FBI’s Counterterrorism Division and Criminal Investigative Division noting the creation of a threat tag, EDUOFFICIALS, to be applied to “investigations and assessments of threats specifically directed against school board administrators, board members, teachers, and staff.” This memo was not revealed until a whistleblower provided it to the House Judiciary Committee in mid-November 2021⁷; in May 2022, Chairman Jordan stated⁸ that the Committee on the Judiciary had evidence that this had been used against parents dozens of times.

⁴ See, e.g., *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954-55 (2018) (“[I]t must be underscored that this Court has recognized the ‘right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights.’” (quoting *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002))); *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 395 (2011) (“an essential safeguard of freedom” that “is of ancient significance”); *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) (“The very idea of a government, republican in form, implies a right on the part of its citizens ... to petition for a redress of grievances.”).

⁵ <https://defendinged.org/press-releases/state-school-board-associations-responses-to-the-nsba-letter/>

⁶ <https://opi.mt.gov/Portals/182/Superintendent-Docs-Images/Homepage%20and%20Press%20Releases/10.14.21%20FederalAction.pdf?ver=2021-10-15-105923-780>

⁷ <https://twitter.com/JudiciaryGOP/status/1460702256601444352>

⁸ <https://nypost.com/2022/05/12/fbi-tracked-parents-opposed-to-covid-policies-republicans-say/>

The question remained however: what was the genesis of such an outlandish memo by an otherwise irrelevant Beltway organization – albeit one with a \$15 million budget,⁹ largely funded by public tax dollars at the district level, paid to state school board associations, and then funneled to a national headquarters? On October 11 and 12, 2021, I personally filed public records requests in the home districts of all NSBA board members to see whether they were involved in the creation of the letter, and how they felt about it. Those FOIA results revealed that not only was the majority of the NSBA board not apprised of the letter in advance, but that they were nearly all opposed to its contents – and furthermore, that NSBA leadership had been in talks with the White House over the letter’s content for “several weeks.”^{10 11 12 13 14}

In addition, I contacted each state affiliate of the NSBA to ask whether their organization was involved in the creation of the letter, whether they agreed with its substance and tone, and whether they planned to report individuals in their state to the U.S. Department of Justice – or rather, that concerns could be adequately managed by local and state law enforcement. At last count,¹⁵ 26 states have either withdrawn their membership, participation, or dues from the NSBA.

An underreported aspect of this ugly episode is that the NSBA did not act in a vacuum. Two weeks before the NSBA’s letter was sent to President Biden, the National Association of Secondary School Principals (NASSP) put out a statement¹⁶ on September 16, 2021 “calling on federal officials to protect school leaders from rampant hostility and violence that disrupts our schools and threatens the safety of our educators and students.” In addition, the NSBA and the School Superintendents Association (AASA) also partnered on joint statements regarding school issues, although AASA declined to request federal intervention.¹⁷

To be clear: my colleagues and I at Parents Defending Education have always opposed violence, and we continue to do so. With that being said, however, my experience working on campus free speech issues have taught me a valuable – albeit tragic – lesson: the definition of “violence” has metastasized over the past five years in popular culture – perhaps driven in part by the poor civics education that students receive in America’s K-12 schools these days.

⁹ <https://projects.propublica.org/nonprofits/organizations/362210015>

¹⁰ <https://defendinged.org/press-releases/foia-documents-reveal-nsba-board-of-directors-not-apprised-of-biden-letter-spoke-to-white-house-before-release/>

¹¹ <https://defendinged.org/press-releases/what-were-you-thinking-emails-reveal-more-state-school-board-members-frustrated-and-upset-with-over-nsba-letter/>

¹² <https://defendinged.org/press-releases/new-nsba-foia-reveals-timeline-of-white-house-conversations/>

¹³ <https://defendinged.org/press-releases/additional-nsba-board-member-emails/>

¹⁴ <https://defendinged.org/press-releases/new-foia-document-asserts-nsba-letter-was-drafted-at-request-of-education-secretary/>

¹⁵ <https://defendinged.org/press-releases/state-school-board-associations-responses-to-the-nsba-letter/>

¹⁶ <https://www.nassp.org/news/nassp-calls-on-federal-officials-to-protect-school-leaders-from-threats-and-violence/>

¹⁷ <https://nsba-cloud-drupal-files-nsba-dev.s3.amazonaws.com/s3fs-public/NSBA+Report-5-19-22+exhibits+only.pdf> (145)

When I launched Speech First in 2017, the phrase “speech is violence” was used on college campuses¹⁸ on the premise that hurtful words cause a stress reaction in the body – which was then used as justification for physically attacking speakers to prevent the speech in question. The definition of “violence” expanded further during the summer of 2021, when protesters demanded¹⁹ that diners in Washington DC repeat their mantras upon – yet again – the threat of actual violence, asserting “silence is violence.” Compelled speech is illiberal, and activists are not entitled to the real estate in the heads or mouths of their fellow citizens.²⁰ Yet much of this behavior was not only tolerated but celebrated by politicians and pundits²¹ – setting a bad example from the top down.

Hateful and offensive speech is protected by the First Amendment, however hurtful said speech may be. Unfortunately, far too many elected and appointed officials do not possess an understanding of the power of free speech in America, despite the fact that ample case law exists on this very topic.

Justice Kennedy noted in *Citizens United v. FEC* that “The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”²² Indeed, “[t]he First Amendment reflects ‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’”²³

As Chief Justice Rehnquist stressed in the 1988 decision for *Hustler Magazine, Inc. v. Falwell*, “[I]f it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.”²⁴

Or as Justice Kagan put it for a unanimous Supreme Court in 2019: “a core postulate of free speech law” is that “[t]he government may not discriminate against speech based on the ideas or opinions it conveys.”²⁵

Yet therein lies the rub: although parents have a Constitutional right to assemble, to speak, to petition their government for a redress of grievances, the airing of those grievances was viewed

¹⁸ <https://www.nationalreview.com/2017/10/college-students-speech-can-be-violence/>

¹⁹ <https://www.usatoday.com/story/news/nation/2020/08/26/video-black-lives-matter-protest-confronting-dc-diners-goes-viral/3441636001/>

²⁰ *Cf., e.g., Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned.” (emphasis, quotation marks, and citation omitted)).

²¹ <https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html>

²² *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

²³ *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (Roberts, C.J.).

²⁴ *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988).

²⁵ *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019).

by school board members – in many cases, solely based upon the speaker’s viewpoint and tone – as “violent,” “offensive,” or “hateful.”

Through our work with parents, my colleagues and I hear many of the concerns of average American families. They are upset about lessons on race and gender that teach our children to view each other through the lens of identity – and to treat each other accordingly; about the elimination of gifted and talented programs in the name of equity; about districts spending finite budget dollars to bring in diversity consultants that sow division, rather than addressing learning loss; about schools facilitating their children’s gender transitions behind their backs; and they are mad that when they try and raise these concerns with their schools, they are mocked by the media and shut down by their elected officials, who have begun to take drastic steps to restrict public comments.

These are valid concerns, and worth discussing and debating in the public square. But sadly, many families have, indeed, been chilled from speaking out about their children’s education.

Attorney General Garland asserted in sworn testimony before both the House and Senate Judiciary Committees in October 2021 that his October 4, 2021 memo was written solely in response to the NSBA’s letter; the NSBA issued an apology²⁶ for its letter on October 22, 2021. Curiously, however, Attorney General Garland has yet to rescind DOJ’s memo. Accordingly, it appears to remain in effect to this day, and hangs over parents like the Sword of Damocles.

As the saying goes, “a fish rots from the head” – and sadly, the federal government’s haughty condescension has emboldened state and local officials to treat citizens with similar disregard.

Parents Defending Education has a tip line, and for approximately 99 percent of the tips that are submitted, people check a box that they want to be anonymous – because they fear retaliation both against themselves as well as their children. In Michigan, Rochester Community Schools was forced to pay a parent after contacting her employer and getting her fired from her job;²⁷ a Florida district attempted the same with a local firefighter.²⁸ In Arizona, one superintendent created a secret dossier on families in the district that was allegedly aimed at intimidating them into silence.²⁹

For many parents, this is their first rodeo. They’re not professional advocates. They simply want the best education for their children, and they see that this is not being provided. These “accidental activists” are vulnerable, and they’re scared.

²⁶ <https://www.nsba.org/News/2021/letter-to-members>

²⁷ <https://www.clickondetroit.com/news/local/2022/03/04/parent-reaches-settlement-with-rochester-community-schools-over-firing-scandal-what-to-know/>

²⁸ <https://www.tampabay.com/news/education/2023/01/17/pasco-dad-seeks-apology-after-principal-calls-his-boss-complain/>

²⁹ <https://www.foxnews.com/us/scottsdale-parents-secret-dossier-sue-former-school-board-president>

It is lamentable that American parents no longer trust their local school officials – but it is tragic that they fear their federal government. On behalf of our thousands of members across the country, we thank you for your dogged pursuit of the details behind the NSBA scandal, your commitment to holding the bad actors accountable, and your defense of citizens' First Amendment rights.